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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91243698
Party	Defendant Stardock Systems, Inc.
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Signature	/Jennette E. Wiser/
Date	05/03/2019
Attachments	Applicant Motion to Resume the Proceeding and for Order to Show Cause - Opp 91243698 - STAR CONTROL.pdf(325741 bytes) Wiser Declaration in Support of Motion to Resume and OSC - Opp 91243698 - STAR CONTROL.pdf(222089 bytes) EXHIBIT A - Frungy Games Inc DE Record.pdf(57849 bytes) EXHIBIT B - Frungy Games Inc CA Record.pdf(304148 bytes) EXHIBIT C - Frungy Games Inc CA Cert of Surrender.pdf(47124 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

FRUNGY GAMES, INC.,

Opposer,

v.

STARDOCK SYSTEMS, INC.,

Applicant.

Opposition No.: 91243698

Application Serial No.: 87/697,919

Mark: STAR CONTROL

Publication Date: May 22, 2018

**APPLICANT’S MOTION TO RESUME THE PROCEEDING AND
FOR AN ORDER TO SHOW CAUSE**

Pursuant to 37 C.F.R. § 2.128(a)(3) and TBMP § 536, Applicant Stardock Systems, Inc. (“Applicant”), by and through its undersigned counsel, hereby respectfully moves the Trademark Trial and Appeal Board (the “Board”) to resume the above-captioned proceeding (the “Frungy Games Opposition”) for the purpose of issuing the Order requested herein requiring Opposer Frungy Games, Inc. (“Opposer”) to show cause why the aforementioned proceeding should not be dismissed in its entirety, with prejudice, and judgment entered in favor of Applicant for the reasons set forth in this motion (“Motion”).

In support of this Motion, counsel for Applicant submits the following:

I. Background

On November 27, 2017, Applicant filed U.S. Application No. 87/697,919 for the mark STAR CONTROL, which is the subject matter of this proceeding (the “STAR CONTROL Mark”). On September 19, 2018, Opposer filed the Frungy Games Opposition opposing the registration of the STAR CONTROL Mark. Dkt. 1.

On October 10, 2018, Opposer filed a Motion to Suspend Proceeding pending the disposition of the civil action titled *Stardock Systems, Inc. v. Reiche, et al.*, Case No. 17-cv-07025-SBA, in the U.S. District Court for the Northern District of California (“Civil Action”), in which Opposer is not a party. Dkt. 4. On October 29, 2018, Applicant filed an Opposition to Opposer’s Motion to Suspend Proceeding. Dkt. 5.

At the same time, Applicant filed a Motion to Dismiss Opposer’s Frungy Games Opposition on the basis that Opposer has failed to adequately allege that it has standing to bring the opposition. Dkt. 5. In particular, Opposer failed to plead any facts, beyond mere conclusory statements, as to how it, Frungy Games, Inc., had a real interest in the proceeding.

On November 20, 2018, Opposer filed an Opposition to Applicant’s Motion to Dismiss. Dkt. 6. However, as briefed in Applicant’s Motion to Strike Brief on Motion, Opposer’s Opposition was (i) filed late, in contravention of 37 C.F.R. § 2.127(a) and TBMP § 502.02(b), and (ii) was not properly served on Applicant’s counsel of record in contravention of 37 C.F.R. § 2.119(b) and TBMP § 113.04. Accordingly, on December 10, 2018, Applicant filed a Motion to Strike Brief on Motion with respect to Opposer’s Opposition to the Motion to Dismiss on the grounds that Opposer’s Opposition was (1) untimely and (2) not adequately served.¹ Dkt. 7.

On December 31, 2018, Opposer filed an Opposition to Applicant’s Motion to Strike Brief on Motion. Dkt. 8. And, on January 22, 2019, Applicant filed a Reply to Opposer’s Opposition to the Motion to Strike Brief on Motion. Dkt. 10. The Frungy Games Opposition has recently been suspended pending the disposition of the above-referenced Civil Action (“Suspension Order”). Dkt. 11.

¹ As of the date of this Motion, Opposer has still failed to properly serve the Opposition to Applicant’s Motion to Dismiss on Applicant. Subsequent to the filing of Applicant’s Motion to Strike Brief on Motion, counsel for Opposer sent a copy of the Opposition to Applicant’s Motion to Dismiss via email to Applicant’s counsel; however, the Certificate of Service was inaccurate providing both the wrong date and mode of service. See Dkt. 10.

II. Legal Argument

A. *Opposer is No Longer in Existence and Therefore Has No Real Interest or Standing*

Opposer has been dissolved and no longer exists. *Declaration by Jennette E. Wiser* (“*Wiser Decl.*”) at ¶¶ 2-4, Exs. A-C. Opposer was a Delaware corporation that was also registered and doing business in California. Dkt. 1; *see Wiser Decl.* at ¶ 2, Ex. A. In particular, Opposer was incorporated with the State of Delaware on May 3, 2018. *Wiser Decl.* at ¶ 2, Ex. A. Subsequently, Opposer registered with the State of California on June 20, 2018. *Wiser Decl.* at ¶ 3, Ex. B. On December 18, 2018, Opposer filed for dissolution with the Secretary of State of Delaware. *See Wiser Decl.* at ¶ 2, Ex. A. And, on December 20, 2018, Opposer filed a Certificate of Surrender with the Secretary of State of California. *Wiser Decl.* at ¶ 4, Ex. C.

Pursuant to 37 C.F.R. § 2.128(a)(3), the Board may issue an order to show cause why the proceeding should not be dismissed where the plaintiff has lost interest in the case (or never had a real or legitimate interest to begin with). *See* TBMP § 536. “The principal purpose of 37 C.F.R. § 2.128(a)(3) is to save the Board the burden of determining a case on the merits... where the plaintiff has lost interest in the case.” *Id.* Here, Opposer was dissolved in December 2018 and therefore, no longer exists. *Wiser Decl.* at ¶¶ 2-4, Exs. A-C. It can be presumed from this fact alone, and for purposes of the subject proceeding, that Opposer has lost interest in the opposition and the case should be dismissed in its entirety with prejudice.

The Board has dismissed proceedings, claims and/or parties where it is established that the plaintiff has been dissolved and is no longer an active legal entity. For example, in *Kenneth Cole Prods. (LIC), Inc. v. Craig*, the Board found that the opposer Le Tigre was not the proper opposer in the proceeding, as it was dissolved, and no longer existed as a legal entity. *Kenneth*

Cole Prods. (LIC), Inc. v. Craig, 2010 TTAB LEXIS 487, *2 (Trademark Trial & App. Bd. March 23, 2010).

Seeing as Opposer is dissolved and no longer exists, it lacks standing (if it ever had standing) to continue to pursue the Frungy Games Opposition.² Section 13(a) of the Trademark Act, 15 U.S.C. § 1063(a), provides that “[a]ny person who believes that he would be damaged by the registration of a mark...” may file an opposition against the registration of such mark. In order to establish standing, the plaintiff must allege “facts sufficient to show a “real interest” in the proceeding, and a “reasonable basis” for its belief that it would suffer some kind of damage if the mark is registered.” TBMP § 309.03(b). The Federal Circuit has held that to establish a “real interest” the plaintiff needs to assert a “direct and personal stake” in the disposition of the proceeding. *Id* (citing *Empresa Cubana del Tabaco v. General Cigar Co.*, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d1023, 1026 (Fed. Cir. 1999)). Also, plaintiff’s belief of damage requires a reasonable basis “in fact”. *Id* (citing *Ritchie*, 50 USPQ2d at 1027 (finding that the belief of damage alleged by plaintiff must be more than a subjective belief)). As Opposer no longer exists, it has no reasonable basis for claiming that it would be damaged by the registration of the STAR CONTROL Mark. A nonexistent entity simply cannot be harmed or suffer damages, just as a nonexistent entity is not capable of filing an opposition proceeding in the first place.

As such, Applicant hereby requests that the Board issue an Order requiring Opposer to show cause why the Frungy Games Opposition should not be dismissed in its entirety with prejudice on the basis that Opposer has voluntarily dissolved and therefore does not have standing.

² Applicant disputes that Opposer ever had standing to bring the Frungy Games Opposition for the reasons set forth in its Motion to Dismiss. *See* Dkt. 5.

B. *Opposer Did Not Exist at The Time Its Counsel Filed Its Opposition to Applicant's Motion to Strike Brief on Motion*

As a procedural matter, noteworthy is that counsel of record for Opposer filed the Opposition to Applicant's Motion to Strike Brief on Motion (Dkt. 8) on behalf of a non-existent entity, since Opposer was dissolved at the time of the filing. In particular, when counsel of record for Opposer filed the Opposition to Applicant's Motion to Strike Brief on Motion on December 31, 2018, Opposer had already been dissolved as of December 18, 2018. This is in addition to counsel of record failing to (i) timely file Opposer's Opposition to the Motion to Dismiss and (ii) properly serve Applicant with a copy thereof, as discussed previously, of which the Board has already taken note.

Also noteworthy is that despite counsel's assertion in Opposer's Motion to Suspend Proceeding (Dkt. 4) that Opposer was going to be substituted as a party in the Civil Action upon which this case has been suspended "in the next week", such substitution has yet to occur. *See* Dkt. 4.

Accordingly, Applicant respectfully requests that the Board require Opposer to show cause why its Opposition to Applicant's Motion to Strike Brief on Motion should not be granted as conceded considering that it was filed on behalf of an entity that voluntarily dissolved and did not exist at the time of filing.

C. Conclusion

In light of the foregoing, Applicant respectfully requests that the Board resume the proceeding and issue an Order requiring Opposer to show cause why the Frungy Games Opposition should not, for the reasons set forth herein, be dismissed in its entirety with prejudice in favor of Applicant.

Dated: May 3, 2019

NIXON PEABODY LLP

By: /Jennette E. Wiser/

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Attorneys for Applicant

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2019, I caused to be served via electronic mail a true and correct copy of the foregoing Applicant's Motion to Resume the Proceeding and for an Order to Show Cause on Opposer through its counsel of record, as follows:

MARK S PALMER
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MILL VALLEY, CA 94941
UNITED STATES
mark@palmerlex.com
Phone: 415-336-7002

/Jennette E. Wiser/

Jennette E. Wiser

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**DECLARATION BY JENNETTE E. WISER IN SUPPORT OF
APPLICANT'S MOTION TO RESUME THE PROCEEDING AND
FOR AN ORDER TO SHOW CAUSE**

I, Jennette E. Wiser, hereby declare:

1. I am an attorney at Nixon Peabody LLP and represent Applicant Stardock Systems, Inc. ("Applicant" or "Stardock") in the above-captioned proceeding. I make this declaration in support of Applicant's Motion to Resume the Proceeding and for an Order to Show Cause. Unless otherwise noted, I have personal knowledge of the following and, if called upon to do so, would and could testify competently to the same in a court of law.

2. Attached hereto as Exhibit A is a true and correct copy of the Delaware Corporation Report for the entity Frungy Games, Inc. that was generated on March 14, 2019.

3. Attached hereto as Exhibit B is a true and correct copy of the Business Search – Entity Detail results with the California Secretary of State for the entity Frungy Games, Inc. that was captured on May 1, 2019.

4. Attached hereto as Exhibit C is a true and correct copy of the Secretary of State Certificate of Surrender for the entity Frungy Games, Inc., which was filed with the California Secretary of State on December 20, 2018.

I declare under penalty of perjury under the laws of the United States and the District of Columbia that the foregoing is true and correct.

Executed this 3rd day of May 2019 in Washington, District of Columbia.



Jennette E. Wiser

EXHIBIT A

Important: The Public Records and commercially available data sources used on reports have errors. Data is sometimes entered poorly, processed incorrectly and is generally not free from defect. This system should not be relied upon as definitively accurate. Before relying on any data this system supplies, it should be independently verified. For Secretary of State documents, the following data is for information purposes only and is not an official record. Certified copies may be obtained from that individual state's Department of State. The criminal record data in this product or service may include records that have been expunged, sealed, or otherwise have become inaccessible to the public since the date on which the data was last updated or collected.

Accurint does not constitute a "consumer report" as that term is defined in the federal Fair Credit Reporting Act, 15 USC 1681 et seq. (FCRA). Accordingly, Accurint may not be used in whole or in part as a factor in determining eligibility for credit, insurance, employment or another permissible purpose under the FCRA.

Your DPPA Permissible Use: No Permissible Purpose

Your GLBA Permissible Use: No Permissible Purpose

Your DMF Permissible Use: No Permissible Purpose

Delaware Corporation Report



Delaware Corporation Report

General Information

Company Name:	FRUNGY GAMES, INC.	Stock Company:	True
File Number:	6870080	Corporation Type:	General Corporation
Date Incorporated:	05/03/2018	Incorporation State:	DE
Status:	Dissolved	Status Date:	12/18/2018
Type:	Domestic A/R Filing Required	Renewal Date:	
Expiration Date:		Last Annual Report Date:	2018

Registered Agent: HARVARD BUSINESS SERVICES, INC. 16192 COASTAL HWY, LEWES, (HARVARD BUSINESS SERVICES, INC.)

Filing History (Last 5 filings)

Filing Year:	2018	Document Code:	Dissolution - Short Form
Filing Date:	12/18/2018	Effective Date:	12/18/2018
Number Pages:	1	Former Name:	
Merger Type:			

Filing Year:	2018	Document Code:	Stock Corporation
Filing Date:	05/03/2018	Effective Date:	05/03/2018
Number Pages:	1	Former Name:	
Merger Type:			

Stock Information

Amendment:		Effective Date:	05/03/2018
Total Authorized Shares:	3000		
Description:	COMMON	Designated Shares:	0
Par Value:	0.0001		

Tax Information

Tax Balance : \$0

Tax Year:	2018
Filing Amount:	50.00
Tax Amount:	175.00
Penalty Amount:	0.00

Interest Amount:	0.00
Other Amount:	0.00
Paid Amount:	(225.00)

Balance:	\$0

EXHIBIT B

Alex Padilla
California Secretary of State

Business Search - Entity Detail

The California Business Search is updated daily and reflects work processed through Wednesday, May 1, 2019. Please refer to document [Processing Times](#) for the received dates of filings currently being processed. The data provided is not a complete or certified record of an entity. Not all images are available online.

C4166169 FRUNGY GAMES, INC.

Registration Date:	06/20/2018
Jurisdiction:	DELAWARE
Entity Type:	FOREIGN STOCK
Status:	SURRENDER
Agent for Service of Process:	ROBERT FORD 730 EUCALYPTUS AVE NOVATO CA 94945
Entity Address:	2533 LAGUNA VISTA DR NOVATO CA 94945
Entity Mailing Address:	2533 LAGUNA VISTA DR NOVATO CA 94945

Document Type	↕	File Date	↕	PDF
SURRENDER		12/20/2018		
SI-COMPLETE		09/17/2018		
SI-COMPLETE		09/12/2018		
REGISTRATION		06/20/2018		

* Indicates the information is not contained in the California Secretary of State's database.

- If the status of the corporation is "Surrender," the agent for service of process is automatically revoked. Please refer to California Corporations Code [section 2114](#) for information relating to service upon corporations that have surrendered.
- For information on checking or reserving a name, refer to [Name Availability](#).
- If the image is not available online, for information on ordering a copy refer to [Information Requests](#).
- For information on ordering certificates, status reports, certified copies of documents and copies of documents not currently available in the Business Search or to request a more extensive search for records, refer to [Information Requests](#).
- For help with searching an entity name, refer to [Search Tips](#).
- For descriptions of the various fields and status types, refer to [Frequently Asked Questions](#).

[Modify Search](#)[New Search](#)[Back to Search Results](#)

EXHIBIT C



Secretary of State
Certificate of Surrender
(Foreign Qualified Corporation ONLY)

SURC

01490219

FILED *Cur*
Secretary of State
State of California

DEC 20 2018 *RP*

IMPORTANT — Read Instructions before completing this form.

There is **No Fee** for filing a Certificate of Surrender

Copy Fees – First page \$1.00; each attachment page \$0.50;
Certification Fee - \$5.00

Note: For information about Franchise Tax Board final tax return requirements, go to <https://www.ftb.ca.gov>.

This Space For Office Use Only

1. Corporate Name (Enter the exact name of the corporation as it is recorded with the California Secretary of State. Note: If you registered in California using an assumed name, see instructions.)

Frungy Games, Inc.

2. 7-Digit Secretary of State File Number **3. Jurisdiction** (State, foreign country or place where this corporation is formed.)

C4166169

Delaware

4. Mailing Address to mail copies of Legal Service (Enter the **complete** mailing address where the California Secretary of State may forward copies of any legal documents against the corporation that are served on the Secretary of State intended for the corporation.)

Mailing Address of Corporation

City (no abbreviations)

State

Zip Code

2533 Laguna Vista Drive

Novato

CA

94945

5. Required Statements (Do not alter the Required Statements – ALL must be true to file this Certificate of Surrender.)

Statements 5(a) – 5(d) are true:

- a) The corporation hereby surrenders its rights and authority to transact intrastate business in the State of California.
- b) The corporation hereby revokes its designation of agent for service of process in California.
- c) The corporation consents to process against it in any action upon any liability or obligation incurred within the State of California prior to the filing of this Certificate of Surrender may be served upon the California Secretary of State.
- d) All final returns required under the California Revenue and Taxation Code have been or will be filed with the California Franchise Tax Board.

6. Read and Sign Below (See Instructions. Office or title not required.)

I am a corporate officer and am authorized to sign on behalf of the foreign corporation.

Signature

Paul Reiche III

Type or Print Name